KUARI TUNJANG SDN. BHD.

v.

FUDO CONSTRUCTION CO. LTD.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 25-109-1987]
27 JUNE 1990

CONTRACT: *Production agreement of aggregates - Breach - Claim for short payment - Delay in supply - Advance payment - Whether there is short payment or overpayment - Whether prepayment was for acquisition of land - Whether production cancelled through unforeseen circumstances - Whether payment a deposit.*

By a written agreement between the plaintiffs, the defendants and Mutsumi, the plaintiffs agreed to the production by Mutsumi of aggregates from their (the plaintiffs') quarry. The plaintiffs agreed to coordinate and assist in the preparation of the production by Mutsumi of approximately 1 million tons of aggregate. The plaintiffs also agreed to acquire extra land to meet the supply of the aggregates. The agreed rate between the plaintiffs and the defendants for the aggregate is RM2.80 per ton.

The plaintiffs alleged that the defendants short paid them by 90 sen per ton for quantity supplied between July 1986 and March 1987. The defendants contended that having made the advance of RM900,000 to the plaintiffs, there had been in fact excess payment and they counterclaim that overpayment. In their defence to the counterclaim, the plaintiffs said that the prepayment had been forfeited. In any case, the plaintiffs said that the prepayment had been utilised to meet the cost of acquiring land and other expenses.

Held:

[1] The advance of RM900,000 was part payment of the agreed price for an estimated quantity, not a deposit for performance of the contract.

[2] If the estimated quantity is not met, any excess price paid has to be refunded.

[3] In the light of the evidence adduced, the plaintiff's claim is dismissed and the defendants' counterclaim for overpayment is allowed.

[Judgment for the defendant.]

Case referred to:
Howe v. Smith [1884] 27 Ch D 89

Legislation referred to:
Contracts Act 1950, s. 75

For the plaintiff - Tan Seng Jin; M/s. Jin-Nge & Co.
For the defendant - Francis Nathar; M/s. Francis Nathar & Co.

JUDGMENT

KC Vohrah J:

In a written agreement entered into on 19 October 1984 between Kuari Tunjang Sdn. Bhd., (the plaintiffs), Fudo Construction Co. Ltd. (the defendants) and Mutsumi Construction Co. Ltd. (Mustumi), the plaintiffs agreed in clause 4 thereof to the production by Mutsumi of

aggregates from their quarry, Quarry Tunjang. This was in order to supply approximately 1 million tons of the aggregates for the construction by the defendant of the Interurban Toll Expressway, Package 1A, Jitra, Kedah. The plaintiffs agreed to coordinate, arrange and assist in the preparation of the production by Mutsumi of the approximately 1 million tons of aggregates. Among the matters the plaintiffs had to do was to acquire extra land to meet with the supply of the aggregates.

That the rate was agreed by the plaintiffs and the defendants for the aggregates at RM2.80 per ton is not disputed and it is so stated in clause 1(a) of the agreement. That this rate was adjusted to a monthly payment of RM1.90 per ton to take into account an advance payment of RM900,000 for 1 million tons at 90 cents per ton is also not disputed (see clause 2(a) and 3(c)(1)). There was no dispute at the trial as to the actual quantity of aggregates, 597,128.03 tons, which was supplied from the plaintiff's quarry nor any dispute that progressive payments totalling RM859,281.85 were made by the defendants to the plaintiffs; at RM1.90 per ton up till 25 April 1986; and from 26 July 1986 till 26 March 1987 at RM1 per ton. It is not disputed that there was a supply of aggregates from plaintiff's quarry in April 1987 after the suit was filed.

The plaintiffs' complaint is that the defendants, in breach of contract, short paid them by 90 cents per ton for the quantity supplied between 26 July 1986 and 26 March 1987 amounting to RM259,252.40. The plaintiffs claim for short payment amounting to RM259,252.40 as at 26 March 1987.

In the plaintiffs' pleadings there is a claim for specific performance but plaintiffs' Counsel in his submission has not touched on the matter and I think the reason is obvious - the Interurban Toll Expressway, Package 1A, has long been completed and the matter of specific performance of the contract does not arise.

The defendants say that the total supply from the plaintiffs' quarries was only 597,128.03 tons; there was delay in the supply from the plaintiffs' quarries and they had to take supplies from alternative sources; but they had made advance payment of RM900,000 to the plaintiffs on the basis of a supply of 1 million tons; and therefore they had to further adjust the payment price (which had been previously adjusted, and it is so stated in the contract, to RM1.90 because of the prepayment) to RM1 from 26 July 1986; so that whatever remained of the advance payment of RM900,000 could be progressively deducted against future supply from that date in order to reduce the overpayment.

This can be tabulated as:

1. Cost of 597,128.03 tons of aggregates supplied at RM2.80 as agreed in clause 1(a) of contract	RM1,671,958.48
2. Amount prepaid to plaintiff (at 90 cents per ton for 1 million tons as in clause 2(a) of contract)	RM900,000.00
3. Progressive payments in tonnage supplied at RM1.90 per ton (after adjustment for prepayment of 90 cents per ton as agreed in clause 3(c)(1)) up to 25 April 1986 and at RM1 per ton (after deduction of 90 cents in further adjustment of prepayment) from 26 July 1986	RM859,281.85
4. Total amount paid by defendants to plaintiff	RM1,759,281.85

The defendants say that in spite of the step taken by the deduction of 90 cents per ton against supply made after 26 July 1986 to reduce the overpayment there was still overpayment at the end of the day and they claimed that the plaintiffs owe them RM87,323.37, this being the difference between the RM1,759,281.80 (item (4) of above table) and RM1,671,958.48 (item (1) in above table). And the defendants counterclaim this amount.

As defence to the counterclaim the plaintiffs rely on clause 2(d) of the agreement which is set out in the later part of this judgment and they say that the prepayment of RM900,000 has been forfeited. I shall deal with the issue of clause 2(d) later but suffice it to say central to the issue whether there is short payment or overpayment is the nature of the prepayment of RM900,000. The plaintiffs say the sum was prepaid to the plaintiffs to allow them to meet the costs of acquiring land and other expenses incurred in furtherance of the said agreement and therefore cannot be deemed as overpayment as claimed by the defendants; and they say this 'can be implied' from clause 1 of the supplemental agreement. In that clause the expression "Tunjang" refers to the plaintiffs and "Fudo" refers to the defendants and it reads:

> In the event production, transport or delivery of the aggregates have to be or forced to be cancelled or stopped completely through unforseen circumstances (political, war, disaster, etc.) Tunjang shall deduct from the prepayment of RM900,000:
>
> i. the aggregate prepayment of aggregate already delivered;
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> ii. cost of land acquired and other expenses incurred in furtherance of this agreement and reimburse fifty per cent (50%) of the remaining amount to FUDO.
>
> ...

The plaintiffs particularly point to para. (ii) of the clause as showing that the prepayment was meant for the acquisition of land and other expenses incurred in furtherance of the agreement.

Before I go further on the plaintiffs' argument that the money was not overpayment let me state that I do not think that this clause can be resorted to by the plaintiffs in the circumstances of this case. PW1, the managing director of the plaintiffs, testifying for the plaintiffs, attributed the delays and stoppages in the supply of aggregates to problems with the local council and other governmental authorities over the quarry licence, approval for operating machinery, etc. I cannot see how these delays in governmental procedure can by any stretch of imagination be categorised as "production" being "cancelled or stopped completely" through "unforseen circumstances (political, war, disaster, etc)". PW1 also said that the defendants were obliged to buy from a Malay quarry and he said that "it looks like a political event" but PW1 agreed that that did not force the plaintiffs from performing their contract. The clause in any event cannot apply in the case as the evidence shows though there were delays in the production of the aggregates, the production was not "cancelled or stopped completely." The clause was meant to cater for the occurrence of one of certain events resulting in complete cancellation or stoppage whereupon part of the repayment of RM900,000 would be re-imbursed to the defendants in accordance with a particular formula. But if as part of the formula the cost of land and other expenses incurred in the furtherance of the agreement are to be deducted it does not *ipso facto* follow that the repayment of RM900,000 in the first place was for such cost and expenses; and indeed in the formula another factor had to be taken into account - the deduction of "aggregate prepayment of aggregates already supplied." The clause was put in for a special purpose and I do not think the special terms therein can be generally relied on for other purposes.

My view is that the sum of RM900,000 was advanced as part payment of the price which had been fixed at RM2.80 per ton and for 1 million tons. Because 1 million tons were expected to be supplied from the plaintiffs' quarry an amount fixed in relation to this 1 million tons was advanced as part payment and the part payment was calculated at 90 cents per ton. The prepayment is however made subject to three clauses, clause 2 (c) and (d) of the agreement and clause 1 of the supplemental agreement that was set out and adverted to earlier. Clause 2(1) provides for the re-imbursement of the prepayment of RM900,000 in full in the event plaintiffs, through their fault, cancel or stop the production, transport or delivery of the aggregates completely to the defendants. On the other hand the parties struck another bargain in clause 2(d) as regards what to do with the prepayment of RM900,000 in the event of any of certain specific events initiated by the defendants happening. Clause 2(d) reads as follows:

> (d) In the event FUDO or MUTSUMI cancels or stops production, transport or delivery of the aggregates completely, FUDO shall forfeit the prepayment amount of RM900,000 and shall not make any claims to Tunjang for the prepayment.

I have dealt with the nature of clause 1 of the supplemental agreement earlier. So far as clause 2(c) is concerned it is penalty clause which can be invoked in terms of s. 75 of the contract Act 1950. As for clause 2(d) the prepayment of RM900,000 appears to be in the nature of the quantity of the aggregates expected to be ordered, and as (and this will be discussed later) the plaintiffs cannot be heard to deny that the quantity to be supplied was on estimated quantity, my view is that the substantial prepayment is more in the nature of part payment for an estimated quantity, not a deposit for performance of the contract to supply 1 million tons. It follows that if the estimated quantity is not met with any excess price paid has to be refunded. In any event even if the prepayment is considered to be a deposit my view is that the evidence adduced does not show that what the parties bargained for in that clause came to pass; the defendants did not stop or cancel production completely; and "the questions as to the right of purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract." (per Bowen LJ *Howe v. Smith* [1884] 27 Ch D 89).

The plaintiffs cannot and do not say that 1 million tons should have been supplied. There was no submission made as regards a breach of contract in the defendants not having taken 1 million tons of aggregates from the plaintiffs' quarries. Though the question of specific performance does not arise as the road project has been completed, I think I should touch on the question of the quantity of aggregates that was contracted for. I think it cannot be gainsaid that though the contract mentions the supply of 1 million tons, language used in clause 1(b) - "The estimate volume (sic) by Fudo shall be approximately 1,000,000 tons" (Emphasis mine; "Fudo" refers to the defendants) - shows the tentative nature of the amount to be supplied from the plaintiffs' quarries. As it is, the plaintiffs are not denying this; plaintiffs' Counsel in his submission has referred to the letter dated 3 November 1986 (pp. 23 and 24, bundle 'B') which was sent to the plaintiffs ("Tunjang" in letter) by GKM - C. Itoh/Fudo Joint Venture ("GCF" in letter) about a meeting held on 28 October 1986 between members of the plaintiffs and GCF, an excerpt of which reads (Emphasis appearing being mine):

> During the meeting held between the above parties on 28 October 1986, what have been discussed are summarized as follows:
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> 1. *the consulting lawyer to Tunjang has stated the comments in effect as follows:*
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> (1-1) *It is Tunjang's understanding that the planned production quantity of one million tons is an approximate and estimated quantity.*

(1-2) *Therefore, a deduction should be made against the advanced payment in proporation to the final production quantity achieved.*

(1-3) The deduction should take place only after the completion of the delivery of all the materials produced.

2. G.C.F. has responded to the above statements made by the consulting lawyer to Tunjang as follows:

(2-1) Fudo agrees to the above statements (1-1) and (1-2).

(2-2) Fudo has not agreed to the above statement under (1-3), because deductions if allowed only after the completion of production will not guarantee the repayment of the amount to be deducted.

3. G.C.F. has shown that the amount to be deducted from the advanced payment will become the one stated below if the final estimated quantity is assumed to be 600,000 tons:

(1,000,000t - 600,000t) x RM0.90/t = RM360,000)

4. Since Mr. P'ng, President of Tunjang, has made an objection to the figure shown in the above (3), *the consulting lawyer has proposed that the both parties' accounting figures worked out based on the quantity of 600,000 tons should be assessed* by the certified public accountants of both parties. Both Tunjang and G.C.F. have agreed to this proposal.

Paragraphs 1(1-1) and 1(1-2) in the excerpt, which are not contradicted by the plaintiffs, to my mind, show that the plaintiffs understood the 1 million tons mentioned in the agreement "as an approximate and estimated quantity" and that they envisaged a lesser amount being supplied from their quarries to the defendants and para. 4 shows a tacit understanding that the final production quantity would be 600,000 tons. The amount actually supplied was 597,123.03 tons.

I now come to the argument of the plaintiffs that the defendants could not unilaterally deduct 90 cent per ton for the aggregates supplied from 26 July 1986. And it is convenient to refer again to the excerpt which was set out earlier.

Plaintiffs' Counsel in his submission has drawn attention to para. (2)(2-2) of the excerpt wherein the defendants did not agree to the plaintiffs' lawyer that the deduction against the advance payment in proportion to the final production quantity should take place only after delivery of all materials produced. The defendant disagreed with the proposal "because deductions if allowed only after the completion of production will not guarantee the repayment of the amount to be deducted" and suggested that the amount to be deducted should be RM360,000 on the basis of a final quantity of 600,000 tons to be supplied and calculated on the formula, (1 million tons - 600,000 tons) 90 cents. PW1 testified that he disagreed with the proposal because if there was to be any settlement it should be in accordance with clause 1 of the supplementary agreement which was reproduced earlier. But that clause cannot be resorted to in this case for the reasons I have given earlier.

With respect I do not see why the defendants could not do what they did. The defendants experienced difficulty in obtaining scheduled supplies from the plaintiffs' quarries for their project wth earliest stoppages in April and June 1985 because of which the defendant had to obtain aggregates from other sources; the evidence shows that PW1 was aware of the buying from other sources. PW1, under cross examination, said he had problems with the governmental authorities until middle of 1986. It is clear various difficulties were experienced relating to the acquisition of new quarry land, to the obtaining of the renewal of crusher plant licence, to the exhaustion of materials from the existing quarry, failure to obtain storage

space for crusher runs (see letters from the defendants to the plaintiffs dated 21 July 1985, 29 May 1986 and 26 June 1986 at pp. 11, 14 to 15 and 12 to 13 respectively in bundle 'B' referred to by plaintiffs' Counsel). While Mutsumi extracted the aggregates from the plaintiffs' quarries it was the plaintiffs' responsibility under the agreement, and this was admitted by PW1, to make it possible for Mutsumi to obtain the aggregates. The defendants informed the plaintiffs by letter dated 21 September 1986 (see p. 18 of bundle B) again of their being behind schedule and also reiterated to the plaintiffs that it was not possible to get the supply of 1 million tons "contemplated at the beginning of the contract, but rather it has become only possible for us to expect to get the final total supply of 600,000 tons of aggregate."

The defendants had to look for alternate sources of supply for the aggregates. PW1 said he heard that the defendants discovered cheaper material including land sand as substitute for the plaintiffs aggregates but he admitted it was hearsay and in any event the evidence did not clearly indicate that. DW1, the manager of administration with the defendants, said the materials were more expensive although he was not able to give details I do not think he was lying, A sight of the documents at pp. 4 to 10 of bundle 'C' show what was done. The defendants bought from other sources starting in May 1985 from Muda Kuari and in July 1986 from Fook Hin Trading Sdn. Bhd. They also started using sand which they found suitable for their work in February 1986 obtaining the supply from Syarikat Chye Trading and from Hiway Engineering (M) Sdn. Bhd. mining sand was purcahsed as from June 1986. They did continue to buy from the plaintiffs up to April 1987; and they had to obtain their supply of crusher run from UMW Yayasan Gurun Kuari Sdn. Bhd. from August 1987 (well after suit was filed). It is clear they had to take reasonable steps to mitigate loss in respect of their other contract for the highway project as surely it was prudent to do.

The plaintiffs were aware of the ongoing problems of the delay and the short supply of aggregates (see letters referred to by plaintiffs' Counsel of letters dated 21 July 1988, 29 May 1986 and 26 June 1986 at pp. 11, 14 - 18, 12 - 13 respectively in bundle B) and clearly they were aware (as shown in the excerpt of the letter which I set out earlier) that the defendants intended to take only about 600,000 tons. The defendants also wrote in a letter dated 21 September 1986 at p. 18 of bundle 'B', "we hereby notify you we have decided to make an off set (sic) for the purpose of settlement of RM900,000 advanced against any monies due to you in progress payments. Should there be however any amount left unsettled we shall issue a claim for a refundment (sic) of the balance". With this letter notice was clearly given that the defendants intended to set-off whatever was owed to them from the advance payment of RM900,000 through deductions in future progress payments and clear notice was given that they intended to claim for any overpayment that remained.

To my mind the plaintiffs' claim has not been made out and they have not succeeded in their defence to the defendant counterclaim.

In view of all the foregoing the plaintiffs' claim is dismissed and the defendant counterclaim of RM87,323.37 for overpayment is allowed. Interest at 4% from 1 May 1987 to date of judgment for the counterclaim and interest at 8% on judgment sum up to date of realisation. Costs to the defendants.

Also found at [1990] 2 CLJ 415